



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

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ATTORNEY GENERAL

October 4, 1951

Hon. H. A. Beckwith, Chairman
Board of Water Engineers
Austin, Texas

Opinion No. V-1297

Re: Requirement for notice
and hearing upon appli-
cation for change of place
of use of permitted waters
and the fees to be charged
upon such an application.

Dear Mr. Beckwith:

Your first question is whether it is mandatory for the Board to issue notice and hold a hearing upon an application for change of place of use of permitted waters.

In an opinion written by this office on February 10, 1921 (Att'y Gen. Ops., Bk.55, p.149, published in Report and Opinions of Att'y Gen., 1920-1922, p.789), it was held that an application for change of purpose of use "should be treated as an original one, requiring advertisement, public hearing, etc., in like manner as if it were an original application for an original permit." (Emphasis supplied throughout.) Recognition and approval of this opinion was given in Att'y Gen. Op. 0-3397 (1941), dealing with the change of place of use.

In Opinion V-390 (1947) addressed to the Chairman of the Board of Water Engineers, this office held that "when passing on application for change of purpose and place of use, you are performing an administrative function, one which concerns regulation or supervision of an already issued permit, and in fulfilling this function you determine in the usual manner after public notice and hearing, if the proposed change will be for a purpose authorized by statute, will impair existing rights, and the public welfare involved in the change."

Prior to Clark v. Briscoe Irr.Co., 200 S.W. 2d 674 (Tex.Civ.App.1947), the courts of this State had never passed on the question of your authority to entertain an application for change of purpose or place of use. In deciding this question in the affirmative, the court held, at page 682:

" . . . No right of appropriation may be acquired without application to the Board, setting forth the place and purpose of use, and a permit granted by the Board designating the place and purpose of use. The Board is charged with the duty of duly informing itself upon all matters relating to the proper performance of its duties in passing upon the application; is required to have a hearing after due notice to all interested parties; and is charged with the express duty to determine, inter alia, whether granting the permit will best subserve the public interest.

"These statutory provisions clearly invest the Board with the power and duty to determine whether the uses for which the application is made meet the statutory objectives, including that of being in the public interest. Necessarily the determination of that issue involves the exercise of a sound and reasonable discretion. Nor is it contended that the Board has not such discretion in passing upon an original application.

"Every consideration for vesting such original discretion in the Board applies with equal force for its exercise in case of change of purpose or place of use . . ."

The foregoing decision and opinions draw the Board's authority to entertain an application for change in place of use from the various statutory provisions dealing with an original permit and relate the function performed by the Board upon such an application to these statutory provisions. The matter of notice and

hearing on the original permit is covered by Articles 7508, 7509, and 7510, V.C.S. Article 7508 provides that "before the Board shall approve such an application for original permit and issue any such permit, notice of such application shall be given." Article 7509 provides that "such notice shall be published" and that "a copy of such notice shall be transmitted . . . to each claimant or appropriator of water from such source of water supply." Article 7510 provides that the Board "shall sit to hear such application" at the time and place stated in the notice.

Inasmuch as the Board's authority to entertain an application for change is drawn from, and is related to, the function it performs upon the original permit application, it would seem that the mandatory provisions of Articles 7508, 7509, and 7510 apply and require notice and hearing upon application for change of purpose and place of use. We construe this to be the effect of the holdings of the Clark case and the quoted opinions of this office. If we are correct in this, then notice and hearing are jurisdictional in the sense that the permit upon change would not be valid without them. If the permit is to be assured of validity, the only safe course is to treat the matter of notice and hearing as mandatory.

Your other question deals with the fees to be charged upon a pending application for change of place of use. The applicant paid the maximum use fee required by Article 7532 when he acquired his original permit and contends that this excuses him from paying the filing, recording, and postage fees which you seek to exact under Articles 7532 and 7511, V.C.S.

Article 7532 provides for four separate and distinct types of fees, viz, filing, recording, certification, and use. After setting out the amounts to be charged for filing, recording, and certification, the statute provides:

"In addition to the fees herein otherwise provided there shall be paid to the Board for the benefit of the State the following fees upon each application for a permit to acquire a water right:

"For the use of water for irrigation, ten cents per acre for each acre to be irrigated.

"For the use of water for hydraulic power twenty-five cents for each theoretical horsepower.

"For use of water for steam or gas power plant, cooling, condensing or steam purposes twenty-five cents for each indicated horsepower.

"For other uses not specifically named herein twenty-five cents per acre foot based on estimated annual consumption.

"For the use of water for parks, pleasure resorts, game preserves, twenty cents per acre foot of storage, based on the holding capacity of reservoir.

"The maximum fees for any use of water under a permit shall not exceed one thousand five hundred dollars and for each additional use under the same permit for which such maximum fee is paid the fee shall not exceed two hundred dollars in addition to said sum of one thousand five hundred dollars."


To us this language clearly relates the statutory maximum to the fee collectible for the use of water. The use fee is payable to the State for the use of its waters. The filing, recording, and certification fees are paid to the State for services rendered by the Board. Article 7511 simply requires the applicant to pay the mailing and publication costs upon issuance of notice of hearing. This charge and the filing, recording, and certification fees due under Article 7532 are separate and distinct from the maximum fee which can be charged for use and are therefore to be paid and collected in addition to the use fee. By the same analogy drawn above with respect to notice and hearing, these fees are to be charged upon an application for change of purpose or place of use the same as upon an original appropriation application.

SUMMARY

Notice and hearing are mandatory upon all applications for change of purpose and place of use of permitted water. The filing, recording, certification, and postage fees prescribed by Articles 7532 and 7511, V.C.S., are collectible upon such an application even though the applicant paid the maximum statutory use fee when securing his original appropriation permit.

Yours very truly

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